

REMARKS

As stated in the Reply Under 37 C.F.R. § 1.111 filed October 20, 2004 in response to the Requirement for Information Under 37 CFR 1.105, Applicant stated that the date of first sale of 'Bernini' took place in October, 1997, in The Netherlands, and that 'Bernini' was not sold in the U.S. prior to the U.S. application date. Further investigations by the inventor revealed that 'Bernini' plant material was **not** first sold in 1997 anywhere in the world. These investigations revealed that 'Bernini' plant material was provided to a Dutch grower in 1997 solely for the purpose of increasing the amount of 'Bernini' plant material. This grower was obligated by contract not to sell or make public the 'Bernini' plant material. Consequently, it was not until **1999**, less than one-year prior to the filing date of the 'Bernini' U.S. plant patent application, that 'Bernini' plant material was first made available to the public. Accordingly, the 'Bernini' plant was not made publicly available, anywhere in the world, more than one-year prior to the filing date of the 'Bernini' U.S. plant patent application.

Applicant hereby submits a Declaration Under 37 CFR 1.132 which provides a timeline from the origin of 'Bernini' to the U.S. filing date of July 19, 1999. The purpose of this declaration is to disclose restrictions made upon a Dutch grower in The Netherlands to whom plant material of 'Bernini' was provided in 1997. The grower was obligated by contract not to sell or make public the 'Bernini' plant material. 'Bernini' plant material was not sold or made available to the public in 1997.

In re Wilhelm Elsner, 2004 U.S. App. LEXIS 16708 (Fed. Cir. 2004), decided together with the companion appeal *In re Keith W. Zary*, 2004 U.S. App. LEXIS 16708 (Fed. Cir. 2004), the United States Court of Appeals for the Federal Circuit (CAFC) held that publication and foreign sale of a claimed plant variety, more than one-year prior to filing a U.S. plant patent application claiming the same variety, **may** bar patenting under 35 U.S.C. §102(b). The CAFC remanded the case to the USPTO for the examiner to consider whether the foreign sales were known to the public and whether the foreign sales permitted asexual propagation of the claimed varieties.

In conclusion, 'Bernini' was not made publicly available, anywhere in the world, more than one year prior to the filing date of the instant U.S. plant patent application.

This Reply is being filed prior to payment of the issue fee. The Reply is required to request that the Declaration Under 37 C.F.R. § 1.132, submitted concurrently herewith, be made of record in this application. Accordingly, entry of this Reply respectfully requested.

It is believed that no fees are due in connection with this Rule 1.312 Reply. In the event this is not correct, the undersigned authorizes the Commissioner to charge Deposit Account No. 19-0741.

Respectfully submitted,

Date April 22, 2005

FOLEY & LARDNER LLP
Customer Number: 22428
Telephone: (202) 672-5483
Facsimile: (202) 672-5399

By Richard C. Peet

Richard C. Peet
Attorney for Applicant
Registration No. 35,792



181011

Atty. Docket No: 082671-0105

Serial No.: 09/357,0103

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

21 DEC. 2004

In re patent application of
Cees A. van der Voort

Serial No.: 09/357,103

Group Art Unit: 1661

Filed: July 19, 1999

Examiner: A.M. Grunberg

For: Lily Plant Named 'Bernini'

DECLARATION UNDER 37 C.F.R. § 1.132

I, Cees A. van der Voort, am the inventor of the above-captioned application and declare as follows:

- (1) 'Bernini', designated in the application as Lily Plant Named 'Bernini', originated from a hybridization in a controlled breeding program in Rijnsburg, The Netherlands, in 1983. 'Bernini' was selected as a flowering plant in 1986. In the fall of 1996, first scaling of 'Bernini' began for commercial plantings.
- (2) 'Bernini' plant material was exhibited at the Aalsmeer Flower Market in 1996, as referenced in the "Aalsmeer Horticultural Sites Fleur Primeur News-New-Novertys" publication of May 5, 1996. 'Bernini' plant material was not sold or made available to the public in 1999.
- (2) 'Bernini' plant material was provided to a Dutch grower in The Netherlands in 1997 solely for the purpose of increasing the amount of 'Bernini' plant material. This grower was obligated by contract not to sell or make public the 'Bernini' plant material.
- (4) In 1997, planting of the scales for growing was initiated. Delivery of saleable bulbs to bulb traders began in 1999.
- (5) 'Bernini' plant material was first made available to the public in 1999 in The Netherlands when commercial quantities of 'Bernini' plant material were released to the public.

2004/12/22 10:54:43 00000

(6) 'Bernini' was not made publicly available, anywhere in the world, more than one-year prior to the filing date of the 'Bernini' U.S. plant patent application.

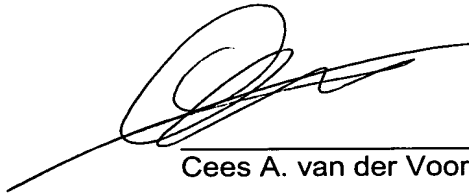
DECLARATION

The undersigned, being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Rijnsburg.

17. 12. 2004

Date



Cees A. van der Voort

GEBR. VLETTER & DEN HAAN
Postbus 234
2230 AE RIJNSBURG
Telefoon: 071 - 408 14 71

2004/12/22 10:54:44 00001